

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED
4-21-16
04:59 PM

Application of the City of Santa Rosa for
Approval to Construct a Public Pedestrian
and Bicycle At-Grade Crossing of the
Sonoma-Marin Area Rail Transit
("SMART") Track at Jennings Avenue
Located in Santa Rosa, Sonoma County,
State of California.

Application 15-05-014
(Filed May 14, 2015)

**MOTION OF THE SAFETY AND ENFORCEMENT DIVISION
TO STRIKE THE ATTACHMENTS TO THE OPENING BRIEF OF
THE SONOMA COUNTY TRANSPORTATION AND LAND USE COALITION,
THE SIERRA CLUB, THE FRIENDS OF SMART, AND
STEPHEN C. BIRDLEBOUGH**

PATRICK S. BERDGE

Attorney for the Safety and Enforcement
Division
California Public Utilities Commission
505 Van Ness Avenue, Room 4300-G
San Francisco, CA 94102
Phone: (415) 703-1519
Fax: (415) 703-4432
E-Mail: Patrick.Berdge@cpuc.ca.gov

April 21, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS	i
I. INTRODUCTION	1
II. GROUNDS OF THE MOTION TO STRIKE	1
A. SCTLC’S Attachments Constitute New Evidence Provided after the Close of the Hearings in the Proceeding	1
B. Presentation of SCTLC’S Attachments Is Prejudicial to SED	2
C. Presentation of SCTLC’S Attachments Constitutes a Denial of SED’s Right to Due Process	2
D. Without A Sponsoring Witness, SCTLC’S Attachments Cannot Be Substantiated	3
E. Submission of SCTLC’S Attachments After the Evidentiary Hearing is Untimely As Well As Prejudicial	4
F. SCTLC’S Attachments Are Duplicative And Cumulative	5
III. CONCLUSION	6

I. INTRODUCTION

The Safety Enforcement Division (“SED”) of the California Public Utilities Commission (“Commission”) hereby respectfully moves to strike the Attachments A through G, to the Opening Brief of the Sonoma County Transportation and Land Use Coalition, the Sierra Club, the Friends of SMART, and Stephen C. Birdlebough (“SCTLC”) pursuant to Rules 13.6 and 13.14 of the Commission’s Rules of Practice and Procedure, 20 C.C.R. §§ 13.6 and 13.14.

On April 18, 2016, SCTLC served its Opening Brief on SED. Attached to SCTLC’s Opening Brief were 29 pages of new material that are not part of the record in this proceeding. SED objects to the presentation of such late-filed evidence after the close of the Evidentiary Hearing preventing SED from cross-examining the sponsors of the documents or submitting rebuttal evidence. Consequently, SED moves the Commission to strike all of these late-filed Attachments.

II. GROUNDS OF THE MOTION TO STRIKE

SCTLC served its Opening Brief with seven attachments late on April 18, 2016, instead of April 15, 2016, as required by the Scoping Memo of the Assigned Commissioner, and as the other parties to the proceeding did.

A. SCTLC’S Attachments Constitute New Evidence Provided after the Close of the Hearings in the Proceeding

The purpose of the Evidentiary Hearing in the Commission’s administrative proceedings is to present the parties’ evidence and allow the testing of that evidence through the process of cross-examination of witnesses presenting that evidence.

If, after the conclusion of the hearing, but before issuance of the decision, the Masts had wished to present additional evidence, they could have filed a petition to set aside submission and reopen the proceeding for the taking of additional evidence pursuant to Rule 84 of our Rules of Practice and Procedure (Rules). Such a petition would have required the specification of facts claimed to justify the receipt of new evidence, such as material changes of fact or

of law alleged to have occurred after the close of the hearing. The petition would also have had to include a description of the proposed additional evidence and an explanation why such evidence was not previously produced.

*(Robert L. Mast v. Pacific Gas and Electric Company; Additional complainant: Steven C. Mast, D.93-05-019, 1993 Cal. PUC LEXIS 905 (May 7, 1993), at pp. *5 & *6.)*

B. Presentation of SCTLC’S Attachments Is Prejudicial to SED

Submitting SCTLC’s Attachments after the Evidentiary Hearing has closed precludes SED from contesting the content of the documents and providing countervailing evidence.

By motion filed May 15, 2012, PG&E moved to strike this new evidence included in and attached to Donald's reply brief. The motion is granted and the argument and attached material is stricken. As the Administrative Law Judge (ALJ) advised at the prehearing conference (RT 60) and at the conclusion of the evidentiary hearing (RT 58:13-59:8), the time and place for taking evidence is at evidentiary hearing. It would be unduly prejudicial to allow the complainant to present new evidence after the adjournment of evidentiary hearings and in reply briefs, thereby denying the defendant of any opportunity to cross-examine or rebut the evidence.

*(Charles I. Donald, Complainant, vs. Pacific Gas and Electric Company (U39E), Defendant, D.12-09-010, 2012 Cal. PUC LEXIS 416 (Sept. 13, 2012), at p. *6.)*

C. Presentation of SCTLC’S Attachments Constitutes a Denial of SED’s Right to Due Process

Submission of Attachments A through G in SCTLC’s Opening Brief deprives SED of its right to due process regarding the substance and content of those documents by denying SED its ability to review the documents and cross-examine the witness(es) sponsoring the documents. “[The Commission acknowledges that its procedures are subject to federal and state due process requirements. (Cal. Const. Art. XII, sec. 2; U.S.

Const., Fifth & Fourteenth Amends.)”¹ “Due process requires that we provide adequate notice and opportunity to be heard.”² SED has not had an opportunity to be heard regarding SCTLG’s Attachments.

D. Without A Sponsoring Witness, SCTLG’S Attachments Cannot Be Substantiated

Without a witness to sponsor the Attachments, the documents cannot be substantiated. For instance, who prepared Attachment A is not provided, its accuracy is unknown. The same is true for Attachment B, C, and F. Further, the purposes of Attachments A and B are not explained. Attachment D appears to be “Exhibit F” which may have been offered at the time of the hearing but does not seem to have been admitted into the record. Attachment E purports to be a “Transcript of Portions of City of Santa Rosa Hearing, March 17, 2015”. However, only a portion of the hearing is contained in the Attachment. A full transcript is not provided.

Finally, Attachment G is entitled “Declaration of Lois Fisher, April 6, 2015, Fisher Town Design” although it appears to actually be signed on April 6, 2016, over three weeks subsequent to the Evidentiary Hearing. While SED had not objected to receiving Ms. Lois Fisher’s testimony (Ex. SCTLG-9) into the record at the time of the hearing on March 14, 2016, SED strongly objects to another declaration by Ms. Fisher dated April 6, 2016, offered for the consideration of the Commission at this late stage of the proceeding. Without a new evidentiary hearing, SED is unable to cross-examine and rebut Ms. Fisher’s new and latest written statement. Rule 13.5 of the Commission’s Rules of Practice and Procedure provides: “To avoid unnecessary cumulative evidence, the presiding officer may limit the number of witnesses or the time for testimony upon a

¹ *Application of BAKMAN WATER COMPANY (U 219 W) for Authority to: (1) Remove the Proceeds of Water Contamination Lawsuits from Contributions-In-Aid-of-Construction, (2) Increase Rate Base, and (3) Recover Increased Revenue Requirements in Rates*, D.03-12-066, 2002 Cal. PUC LEXIS 1065 (Dec. 18, 2003) at pp. *10-*11.) *See also*: A violation of any right of the petitioner under the Constitution of the United States or the California Constitution under Pub. Util. Code § 1757.1 (a) (6) is a basis for appeal of a Commission decision.

² *ARCO Products Company, Mobil Oil Corporation, and Texaco Refining and Marketing, Inc., Complainants, vs. Santa Fe Pacific Pipeline, L.P., Defendant, And Related Matters*, D.12-03-026, 2012 Cal. PUC LEXIS 135 (March 8, 2012).

particular issue.” Evidence lacking a sponsoring witness is not commonly admitted into evidence.³ The Commission relies only on evidence properly contained in the record. Evidence contained in the record may be presented as prepared testimony “provided that copies shall have been served upon all parties prior to hearing and *pursuant to the schedule adopted in the proceeding* (emphasis added).” (Rule of Prac. & Proc. § 13.8 (a).)

In the alternative, evidence may also be presented through direct testimony at the evidentiary hearing. (*Id.* at § 13.8 (b).) The Commission may not rely on information that is not contained in the record of the proceeding.⁴ For these reasons, it is important that SCTLC’s Attachments, which do not appear in the record of the proceeding, be excluded from consideration by the Commission.

E. Submission of SCTLC’S Attachments after the Evidentiary Hearing is Untimely As Well As Prejudicial

The time and place for taking evidence is at the evidentiary hearing. The time for presenting evidence was mentioned in the Scoping Memo of the Assigned Commissioner

³ *Mrs. Kathleen R. Marzolf, et al., Complainants, vs. Pacific Gas and Electric Company, Defendants*, D.95-02-048, 1995 Cal. PUC LEXIS 99; 58 CPUC2d 656 (Feb. 8, 1995) at p. *6.

⁴ “The Commission’s decision cannot be based on extra-record material, regardless of whether parties objected to the material or not. (See Pub. Util. Code, § 1701.2, subd. (a); Cal. Code Regs., tit. 20, § 15.5, subd. (b).)” (*Order Instituting Investigation on the Commission’s Own Motion into the Operations and Practices of Pacific Gas and Electric Company to Determine Violations of Pub. Util. Code § 451, General Order 112, and Other Applicable Standards, Laws, Rules and Regulations in Connection with the San Bruno Explosion and Fire on September 9, 2010; Order Instituting Investigation on the Commission’s Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Transmission System Pipelines; Order Instituting Investigation on the Commission’s Own Motion into the Operations and Practices of Pacific Gas and Electric Company’s Natural Gas Transmission Pipeline System in Locations with High Population Density*, D.15-07-045, 2015 Cal. PUC LEXIS 424 (July 23, 2015) at p. *12). See also: “In addition to following statutory and decisional law, the holding that late-tendered, off-the-record material should not be considered is consistent with the normal approach for conducting Commission proceedings, set forth in our Rules.” (*In the Matter of the Application of San Francisco Deluxe Sightseeing, LLC for Passenger Stage Authority under Pub. Util. Code Section 1031 et seq. to transport passengers and their baggage on a regularly scheduled basis between various points in the City and County of San Francisco, and various points in the County of Marin; and to establish a Zone of Rate Freedom under Pub. Util. Code Section 454.2 et seq., And Related Matters*, D.14-04-024, 2014 Cal. PUC LEXIS 174 (April 10, 2014) at pp. *17-*18.)

(Dec. 11, 2015), at the Public Participation Hearing (“PPH”) (Tr. Vol. 1 at p. 6.), and at the start of the Evidentiary Hearing as the proper time and place for such evidence (Tr. Vol. 2 at p. 69. The Commission has recognized that it is unduly prejudicial a party to present new evidence after the adjournment of evidentiary hearings because it denies the opposing party any opportunity to cross-examine or rebut the evidence. (*Charles I. Donald, Complainant, vs. Pacific Gas and Electric Company (U39E), Defendant*, D.12-09-010, 2012 Cal. PUC LEXIS 416 (Sept. 13, 2012), at p. *6.)

F. SCTLC’S Attachments Are Duplicative And Cumulative

Attachment A purports to be a map of the fencing SMART may install near Jennings Avenue. The issue of fencing was presented by SCTLC in the testimony of Mr. Richards (Ex. SCTLC-10) and the cross-examination of Mr. Stewart by the City and Mr. Duncan (Tr. Vol. 2 at pp. 154-155, and 192-209). What relevance the map has to this testimony is not explained. Attachment A is unsubstantiated, unnecessary, and cumulative evidence.⁵

Attachment B concerns the City’s Bicycle Path which was the subject of testimony in the hearing. (Tr. Vol. 2 at pp. 99-100.) Attachment C is SCTLC’s own summary of the Commission’s PPH. The Commission’s transcript of the PPH is contained in Tr. Vol. 1. Attachment D is a copy of a photograph of a Rohnert Park, California, at-grade crossing which is, without further explanation, irrelevant to this proceeding. Attachment F purports to show bicycle routes near Jennings Avenue which, without explanation or a sponsoring witness, is irrelevant to this proceeding. Attachment G is new testimony never before shared with SED.

⁵ “Staff proposes to introduce new evidence of respondents' alleged continuing violations of D.93-11-058, of respondents' ability to comprehend D.93-11-058, and of competition for passengers at San Ysidro. Because the new evidence is largely cumulative and would require a further, unnecessary, public hearing in this investigation, we deny the petition [to set aside submission and reopen].” (*Order Instituting Investigation for Denial of Passenger Corporation Certificate [PSC 8682] and Revocation of Charter-party Carrier Permit [TCP 8682-P], of Halcones Autobus, Inc.; and its officers, Ismael Diaz Ruiz, President; Juan Borjas Aguilar, Vice President; and Noe Torres Garcia, Treasurer, Respondents*, D.95-09-087, 1995 Cal. PUC LEXIS 812 (Sept. 27, 1995) at pp. *8-*9.)

III. CONCLUSION

For the reasons stated above, SED respectfully requests the Commission grant SED's motion to strike all the Attachments to SCTLG's Opening Brief.

Respectfully submitted,

/s/ PATRICK S. BERDGE

Patrick S. Berdge

Attorney for the Safety & Enforcement Division

California Public Utilities Commission
505 Van Ness Avenue, Room 4300-G
San Francisco, CA 94102
Phone: (415) 703-1519
Fax: (415) 703-4432
E-Mail: psb@cpuc.ca.gov

April 21, 2016